IN THE

SUPREME COURT OF THE UNITED STATES

NO 76-1752

JUDY BERRY and DONALD A. BERRY,

Petitioners

v.

HINDS COUNTY, MISSISSIPPI,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

Pat H. Scanlon
Brad Sessums
1440 Deposit Guaranty Plaza
Jackson, Mississippi 39201

Counsel for the Petitioners

OF COUNSEL:

YOUNG, SCANLON AND SESSUMS
1440 Deposit Guaranty Plaza
Jackson, Mississippi 39201

TABLE OF CONTENTS

CITATIONS

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

NO.

JUDY BERRY and DONALD A. BERRY,

Petitioners

v.

HINDS COUNTY, MISSISSIPPI,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

The petitioners, Judy Berry and Donald A. Berry, respectfully pray that a writ of certiorari issue to review the order and opinion of the Supreme Court of the State of Mississippi entered in this proceeding on March 30, 1977.

OPINIONS BELOW

The judgment of the Circuit Court of the First Judicial District of Hinds County, Mississippi (Appendix C, infra, pp. 32,33) is not officially reported. The opinion of the Supreme Court of the State of Mississippi (Appendix A, infra, pp.18-29) is not yet officially reported.

JURISDICTION

The order of the Supreme Court of the State of Mississippi (Appendix B, infra, p. 30) affirming the lower court judgment, was entered on March 30, 1977. The jurisdiction of this Court is conferred by 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the governmental immunity accorded Hinds County, Mississippi by the Supreme Court of the State of Mississippi, thereby denying to petitioners damages for personal injuries and property damage sustained due to the negligence of the respondent's agent in allowing a bridge to deteriorate and collapse, is violative of the "due process of law" provisions of the Fifth and Fourteenth Amendments of the United States Constitution, and the "equal protection" provisions of the Fourteenth Amendment.

STATUTORY PROVISIONS INVOLVED

The applicable provisions of the Fifth and Fourteenth Amendments of the United States Constitution are set forth in Appendix D, infra, page

STATEMENT OF CASE

Petitioners Berry instituted suit in the Circuit Court of the First Judicial District of Hinds County, Mississippi against Hinds County, Mississippi, alleging that the petitioners had received personal injuries and property damage when the car in which they were riding in November of 1970 fell from a collapsed bridge on a county road in Hinds County, Mississippi. Petitioners further alleged that the deterioration and collapse of the bridge was proximately caused through the negligence of Mr. Malcolm N. Warren, the Supervisor of the particular "beat" in which the bridge was located. Prior to this effort to impose liability upon Hinds County, Mississippi, suit had been brought by petitioners against Mr. Warren, individually, and his bonding company for his negligence. The circuit court sustained a demurrer in that proceeding, and an appeal was taken to the Supreme Court of the State of Mississippi. On appeal in that matter, the Supreme Court of the State of Mississippi held in Berry v. Warren, et al., 304 So.2d 284 (1974), that the duty of inspection and repair of the bridge in question was the duty of the entire Board of Supervisors, and not of Mr. Warren individually. The lower court judgment sustaining the demurrer was affirmed, and this action commenced.

Hinds County, Mississippi, filed a General Demurrer in the trial court alleging that in the absence of statute, Hinds County, Mississippi, was immune from suit, based on the tortious activities of its officers or employees. That demurrer was sustained by the circuit judge on the theory of governmental immunity, the declaration filed therein was dismissed, and petitioners then took an appeal to the Supreme Court of the State of Mississippi.

At the time of the happening of the wreck in which petitioners were injured, there was in effect in the State of Mississippi a statute (§65-7-117, Mississippi Code of 1972; §8344 Mississippi Code of 1942), requiring each member of the Board of Supervisors to inspect every bridge in his district at least every three months in each year, and to file with the Clerk of the Board of Supervisors a report of the conditions of those bridges inspected by him, with such recommendations as were needed. It was further required that once a year the entire board make a complete inspection of all public bridges in the county. As was alleged in the suit filed in the circuit court, the failure of the individual supervisor as agent of Hinds County, Mississippi, properly to inspect and make needed recommendations as to the repair of the bridge in question proximately resulted in the injuries and property damage to the petitioners.

Although petitioners alleged in their Declaration that to deny relief to them in this proceeding in view of the prior decision of the Supreme Court of the State of Mississippi in Berry v. Warren, supra, would be in deprivation of their rights under the United States

Constitution, as it would deprive them of their property without due process of law, the circuit court nevertheless sustained the demurrer.

The Supreme Court of the State of Mississippi, in its opinion (Appendix A, infra, p. 18), without touching on the Constitutional issue, held that the doctrine of governmental immunity applied, and that the judgment of the Circuit Court of the First Judicial District of Hinds County, Mississippi, sustaining the demurrer would be affirmed.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW HOLDING HINDS COUNTY, MISSISSIPPI, IMMUNE FROM SUIT IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The Fourteenth Amendment to the Constitution of the United States provides in part:

> "... nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws."

The Fourteenth Amendment, therefore, forbids the States to discriminate unconstitutionally against any person or class of person within the states' respective jurisdiction. The doctrine of sovereign or governmental immunity as it now exists in the State of Mississippi creates three classes of individuals in the State of Mississippi, who have suffered injury to their person or property.

The first is that class of individuals injured by some wrongful act or omission of the state or county. Those individuals cannot acquire jurisdiction over the state or county unless there is available some statute expressly, or by necessary implication, authorizing such an action. Ayres v. Board of Trustees of Leake County Agricultural High School, 134 Miss. 363, 98 So. 847 (1924); Simpson County v. Kelly, 166 So. 532, 175 Miss. 596 (1936). Absent such consent to suit by statute, those injured individuals are precluded from litigating their claims in the branch of government uniquely suited by training and experience impartially to hear and to resolve disputes arising from injury to person or property.

The second is that class of individuals injured by some wrongful act or omission of a municipality based on negligence in the exercise of a "private or proprietary" function as opposed to the exercise of a function which is "essentially governmental in character". Bishop v. City of Meridian, 223 Miss. 703, 79 So.2d, 221 (1955) Suggestion of error overruled, 223 Miss. 703, 79 So.2d, 815; Tucker v. City of Okolona, 227 So.2d 475 (1969).

The third is that class of individuals injured by some wrongful act or omission of a private person. Those individuals have full and free access to the courts for the litigation of their claims.

Under the foregoing classifications, persons injured by a governmental entity are classified, solely, by the type of governmental entity involved. Their right to redress and the remedies available, to them, is dependent solely upon this classification. Does a person's right to redress by due course of law become less worthy of protection because he or she was injured by a particular governmental unit? Does such person's right to compensation become any the less worthy

because of the type of governmental unit involved?

Under the present Mississippi law, no regard is given to the injury, or the facts and circumstances surrounding the events which caused the injury--it is the type of governmental agency and the activity in which it is engaged that determines whether the aggrieved party will find the doors of the court open or closed. Such a classification is forced and unreal, and greater burdens are imposed on some than others, thereby making those classifications arbitrary, discriminatory, and unreasonable.

It appears that the courts of this country have been infrequently confronted with the argument that the doctrine of sovereign immunity violates the Equal Protection Clause of the Fourteenth Amendment.

However, in 1971, the Court of Appeals of Ohio directly faced the issue and held that sovereign immunity violated the Equal Protection Clause. Krause v. State, 28 Ohio App. 2d 1, 274 N.E. 2d 321 (1971). In addressing itself to the issue of sovereign immunity, the court posed the following question:

> "Is the withholding of a remedy based on reasonable or on arbitrary grounds when it is withheld from persons injured by state torts but not private ones, or from some persons but not others injured by government in tortious, but different phases of its activity? Do such distinctions reflect a rational policy or simply capricious action?" (At p. 327).

The court concluded that the only possible basis for sovereign immunity is the threat of numerous suits against the state, but then indicated that such is not a rational basis for denying equal protection, stating:

> "If the threat of multiple suits is not a tenable basis for the distinctions created by the immunity, and we hold it is not, then there is none. The distinctions then depend on a gossamer as frail as that supporting those distinctions founded on nationality or race. A distinction so based is capricious and represents no policy but an arbitrary attempt to lift state responsibility without reason. In such circumstances, the permissible line between reasonable classification or a rational policy, and a denial of equal protection is crossed. This fatally offends the Constitution." (At p. 327).

Unfortunately, the Ohio Supreme Court subsequently reversed the decision of the Ohio Court of Appeals. Krause v. State, 31 Ohio St.2d 132, 285 N.E.2d 736 (1972). In that case Justice Brown dissented and wrote an opinion which ably analyzes the equal protection argument as it applies to sovereign immunity. He began his dissent by asserting that the Ohio law which prohibits suit against the state without the state's consent:

> "...unconstitutionally discriminates against the victims of state acts of negligence, in violation of the equal protection provision of the United States Constitution. It infringes upon one of the most fundamental progenitors of due process of law through which all other legal rights may be enforced--access to the courts unhindered by the need for the expressed consent of the party-defendant." (At p.746)

In recognizing the fundamental nature of the right with which this appeal is concerned, Justice Brown stated:

> "The ability to seek redress in the courts is a fundamental right guaranteed by the due process provision of the Fourteenth Amendment to the United States Constitution, and restrictions on such a right require 'close scrutiny' by the judiciary. (Citations omitted). A state classification denying this right to the victims of state negligence, in absence of that state's express consent, draws a line that is repugnant to our traditional democratic concept of governmental responsibility to the public." (At p. 747).

He offered further analysis of the equal protection argument, reasoning:

> "...where the state commits intrinsically the same negligent act as would justify recovery if committed by a private entity and the law lays an unequal hand on those who have 'been the unfortunate victims of the state...it has made an as invidious discrimination as if it had selected a particular race or nationality for oppressive treatment'." (At p. 747)

The majority of the Supreme Court in Krause appears to have based its reversal, in part, on the notion that the rule of sovereign immunity is not a denial of equal protection because it does not classify persons; it denies the right to sue the state to all individuals. In meeting that argument, Justice Brown pointed out:

> "However, as recognized in Brown v. Board of Education, 347 U.S. 483, 74 Sup.Ct. 686, 98 L.E. 873 (1954), 'separate but equal' does not comport with equal protection of the laws where a fundamental right is involved." (At p.748).

The majority of the Supreme Court in Krause also suggested that no discrimination

problem arises when things are different in fact, i.e., there is no Constitutional requirement that things different in fact be treated as though they were the same. Justice Brown, agreeing with this premise, then applied the reasoning underlying the premised sovereign immunity issue:

> "...I believe that in order to determine whether such difference does exist, we must focus upon the underlying substantive conduct involved, and not the status of the party-defendant, when a denial of due process is involved. If two people are walking down the street together, and one is negligently run down by a privately owned and operated truck, while the second is run down by a state owned and operated truck, the law--in common decency--can ill afford to say that those identical accidents are 'things which are different in fact'."
>
> * * *
>
> "The victim of the state truck is both substantively and literally in no different a position than the victim of the private truck. Yet one, but not the other, is denied his day in court..." (At p. 749).

While it is true that all victims of the wrongful acts or omissions of the State of Mississippi, or a county thereof, are denied access to an adequate remedy, sovereign immunity does in fact create and perpetuate two classes of injured individuals. There is no rational basis for making such a class distinction, and the rule of sovereign immunity destroys the fundamental right of access to an adequate remedy for injuries wrongfully inflicted.

The Supreme Court of the State of Kansas likewise dealt with the issue of the unconstitutionality of governmental immunity in the case of Brown v. Wichita State University, et al., 217 Kan. 279, 538 P.2d 713 (1975). The lawsuit precipitating the appeal in which this opinion was rendered arose from the crash of a chartered aircraft carrying members of the 1970 Wichita State University football team, members of the faculty and university supporters. The plaintiffs were either surviving passengers or the personal representatives of those killed in the crash. Wichita State University was one of the defendants, and under Kansas law, as a state educational institution, the university had become an agency of the State of Kansas, controlled and operated under the supervision of the Board of Regents. After the three lawsuits were consolidated, the district court ruled that the governmental immunity statutes of the State of Kansas were constitutional and rendered summary judgment in favor of Wichita State University. The plaintiffs in their appeal made a direct attack on the statutory constitutionality of the enacted doctrine of governmental immunity in the State of Kansas as denying them equal protection of the law under the Fourteenth Amendment to the United States Constitution, and as denying them due process of the law under the Fourteenth Amendment. The Supreme Court of Kansas found that the doctrine of governmental immunity as contained in the Kansas statutes was constitutionally impermissible and violative of the Fourteenth Amendment. In so finding, that court stated:

> "The doctrine of governmental immunity is an historical anachronism which manifests an inefficient public policy and works injustice upon everyone concerned. The doctrine and the exceptions thereto, operate in such an illogical manner as

> to result in serious inequality. Liability is the rule for negligent or tortious conduct, immunity is the exception. But when the tortfeasor is a governmental agency, immunized from liability, the injured person must forego his right to redress unless within a specific exception. Equality is not achieved by artificial exceptions which indiscriminately grant some injured persons recourse in the courts and arbitrarily deny such relief to others. (Citation omitted.) The operative effects of such arbitrary distinctions are incompatible with the constitutional safeguards established by both the federal and Kansas Constitutions."

Although, upon rehearing, the Kansas Supreme Court reconsidered its position (547 P2d 1015) and held that since the legislature had made the prior common law immunity statutory, it was not the judiciary's place to obviate the legislature's will, the initial decision thoroughly and properly analyzes the common law concept of immunity from a Constitutional standpoint.

For these reasons, the doctrine of sovereign immunity violates the Equal Protection Clause of the Fourteenth Amendment, and should be abrogated by this Court on the grounds that it is unconstitutional.

II

THE DECISION BELOW HOLDING HINDS COUNTY, MISSISSIPPI, IMMUNE FROM SUIT IS VIOLATIVE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUION OF THE UNITED STATES AS DENYING DUE PROCESS

In addition to being violative of the "Equal Protection" clause of the Fourteenth Amendment, the doctrine of governmental

immunity as applied in this case deprives the petitioners of their property without due process of law, likewise in violation of the Fourteenth Amendment and the Fifth Amendment to the Constitution.

The doctrine of sovereign immunity, as applied in the State of Mississippi, prevents access to the courts for litigation of certain claims against the state, and through that immunity, against the county. Denial of access to the courts, coupled with the absence of a comparable substitute forum and procedure for determining claims, amounts to a denial of due process of law for victims of injuries wrongfully inflicted by an agent of the county in the State of Mississippi.

The question of access to the courts has not often been considered within the context of due process. Yet it seems that one of the essential requirements of due process of law ought to be access, for victims of wrongfully inflicted injuries, to an impartial tribunal suited by training and experience to hear claims of injuries to person and property, to sift competent from incompetent evidence, to determine the applicable rules of law, and to apply the appropriate rules of law to the cases brought before it. The few courts which have considered the issue of access all seem to agree that it is essential to our legal system to provide for an orderly, fair and effective means of resolving disputes among people; that persons involved in disputes are entitled to a meaningful opportunity to be heard; that the procedure employed for resolving disputes must be appropriate to the nature of the case; and that, if the judiciary itself is not employed to resolve disputes, then a reasonable substitute ought to be made available.

The United States Supreme Court, in Boddie v. Connecticut, 401 U.S. 371, 91 Sup.Ct. 780, 28 L.E.2d 113 (1971) dealt squarely with the issue of access to the courts as a due process requirement.

In Boddie, an indigent, desiring to obtain a divorce, challenged a state statute which required payment of court filing and process fees as a condition precedent to gaining access to the divorce court. The Supreme Court held the statute to be violative of due process of law because it denied to indigents access to the only remedy available to obtain the kind of relief desired.

Justice Harlan, writing for the majority, observed that organized society needs a legal system characterized by stability and predictability. He acknowledged that the courts provide such a system by stating:

> "American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for disputes settlement, not on custom or the will of strategically placed individuals, but on the common law model. It is to courts, or to other quasi-judicial bodies that we ultimately look for the implementation of a regularized, orderly process of dispute settlement." (At p. 375).

Although Justice Harlan limited the application of that decision to the issue of an indigent seeking a divorce, Justice Brennan, in his concurring opinion, argued:

> "I see no Constitutional distinction between appellant's attempt to enforce this state statutory right and an attempt to vindicate any other right arising under federal or state law.

> "The right to be heard in some way at some time extends to all proceedings entertained by courts. The possible distinctions suggested by the Court today will not withstand analysis." (At pp. 387,388).

The courts have provided the common law model for what Americans have come to rely on as "due process". All the attributes of judicial proceedings--the rights to notice, the opportunity to be heard, to cross-examine, to findings based on competent evidence--are attributes of due process. Americans have come to expect their "day in court" when they have disputes, and that "day in court" means that due process of law in all its aspects will be available and will be meaningfully applied.

The Kansas Supreme Court in the Brown case, supra, spoke also to the "due process of law" issue raised by the plaintiffs in that case, and reasoned:

> "To say the governmental immunity statutes in question subvert the concept of due process, is but to state the obvious, for that doctrine blocks access to our courts to those seeking redress for injuries occasioned by the negligent acts of a governmental entity. In the instant case, the appellants have been summarily excluded from our courts-the only forum empowered by the people to redress their grievances by due process of law..."
>
> * * *
>
> "But if due process is to be secured, the law must operate alike upon all, and not subject the few to the arbitrary exercise of governmental power. Every

> citizen of this state has a right to be protected by the government in the enjoyment of his life, liberty, and property. To that end elaborate safeguards are to be found in the law. The life and liberty the state may not take directly, it may not take indirectly for a 'grant of power by the public is never to be interpreted as a privilege to injure'." (Citation omitted.)

It is curious to note that when the State of Mississippi, through its power of eminent domain takes real property for public use, the property owner has a right to have the court determine the fairness of the award, but that there is no corresponding right when the state or county wrongfully inflicts injury to person or property. Sections 11-27-1, et seq., Mississippi Code of 1972. There seems to be no legal or logical reason to deny the same right to a victim of personal injury wrongfully inflicted by the state or one of its subdivisions.

The decision in the Supreme Court of the State of Mississippi, involving the deprivation of Constitutional rights secured to these petitioners, justifies the grant of certiorari to review the judgment below.

CONCLUSION

When the State of Mississippi, or one of its subdivisions, the county government, can, through the acts of its agents and in violation of its express responsibilities to its citizens, inflict damage to person and property without being required to render compensation to the injured, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clauses of the Fifth and Fourteenth Amendments become meaningless. The Supreme

Court of the State of Mississippi in this case has decided an important question of Constitutional law which has not been, in light of present-day circumstances, but should be, expressly settled by this Court. Although this case involves only two individuals and their damages, the Constitutional question presented by this case is important to every citizen of the United States of America who may one day stand in the shoes of these petitioners. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Mississippi.

Respectfully submitted,

Pat H. Scanlon
Brad Sessums

Counsel for Petitioners

YOUNG, SCANLON AND SESSUMS
1440 Deposit Guaranty Plaza
Jackson, Mississippi 39201

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

NO. 49,135

JUDY BERRY AND DONALD A. BERRY

V.

HINDS COUNTY, MISSISSIPPI

BEFORE PATTERSON, ROBERTSON AND BROOM

ROBERTSON, JUSTICE, FOR THE COURT:

This suit involves the doctrine of governmental immunity of a county from suit.

Suit was brought by Judy and Donald A. Berry against Hinds County, Mississippi, in the Circuit Court of the First Judicial District of Hinds County, to recover damages for personal injuries suffered by them when their automobile crashed into a collapsed bridge which spanned a large ditch on Longino Road in Hinds County. The accident happened about 6:30 p.m. on November 22, 1970, as the plaintiffs with their children were riding in the family automobile.

A general demurrer was sustained to the declaration, and the plaintiffs declining to plead further, the judgment was made final and the declaration dismissed.

On appeal, the Berrys contend that the doctrine of governmental immunity should be abolished - that there is no valid reason for continuing this outmoded and antiquated doctrine. The appellants further contend that this doctrine of sovereign or governmental immunity was created by the courts and therefore should be abolished by them.

Appellants cite Ayala v. Philadelphia Board of Public Education, 305 A.2d 877 (Pa. 1973), as their most persuasive authority. In a very lengthy opinion, by a four-to-three vote, the Supreme Court of Pennsylvania reached this conclusion:

> "We now hold that the doctrine of governmental immunity--long since devoid of any valid justification--is abolished in this Commonwealth." 305 A.2d at 878.

This broad and all-encompassing ruling was made in spite of the fact that the suit was only brought against the Philadelphia Board of Public Education for injuries suffered by William Ayala, Jr. when his arm was caught in a shredding machine in the upholstery class of the Carrol School in the City of Philadelphia.

The appendix to the opinion in Ayala lists eighteen states (including the District of Columbia) which have judicially abrogated the doctrine of governmental immunity. Pennsylvania, of course, should be added to the list, and, also, Alabama, which abrogated the doctrine as to counties (by a five-to-four vote) in Lorence v. Hospital Board of Morgan County, 320 So.2d 631 (Ala., 1975). This makes a total of twenty states. Seven states are listed as having statutorily abrogated the doctrine.

One hundred years ago in the landmark case of Brabham v. The Board of Supervisors of Hinds County, 54 Miss. 363 (1877), this Court stated its views on the doctrine of governmental immunity:

"The plaintiff in error sued the defendant in error to recover damages for the death of her husband, produced by the falling of a county bridge while he was crossing it with his wagon and team.

"If a county can be held liable for damages suffered in consequence of neglect to repair a county bridge in any case, it should be held so in this. At common law, a county could not be so held liable. No statute makes it liable. The 'demands', 'accounts' and 'claims' contemplated in the statutes to be audited and allowed by boards of supervisors, and authorized to be sued on, if allowance is refused by the board, are manifestly such liabilities of the county as are provided for by some statute. A county can have no liability except as authorized, expressly or by necessary implication, by some statute. Counties are political divisions of the State, created for convenience. They are not corporations with the right to sue and be sued as an incident to their being, but are quasi corporations, invested by statute with certain powers, and subject to certain liabilities, and can neither sue nor be sued, except as authorized by statute. The right to maintain a suit like this against a county is not only outside of the contemplation of the statutes, but is opposed by every consideration of sound policy." 54 Miss. at 364.

Over the years since Brabham, Mississippi has steadfastly adhered to this fundamental doctrine. Owens v. Jackson Municipal Separate School District, 264 So.2d 892 (Miss. 1972); Lowndes County, District 5 v. Mississippi State Highway Commission, 220 So.2d 349 (Miss. 1969); Board of Education of Forrest County v. Sigler, 208 So.2d 890 (Miss. 1968); Board of Supervisors of Lee County v. Payne, 175 Miss. 12, 166 So.332 (1936); Simpson County v. Kelly, 175 Miss. 596, 166 So.532 (1936); Federal Land Bank v. Leflore County, Mississippi, 170 Miss. 1, 153 So.882 (1934): McNulty v. Vickery, 126 Miss. 341, 88 So.718 (1921); City of Grenada v. Grenada County, 115 Miss. 831, 76 So.682 (1917).

In Monaco v. State of Mississippi, 292 U.S. 313, 78 L.Ed., 1282 (1933), the Supreme Court of the United States said:

> "The 'entire judicial power granted by the Constitution' does not embrace authority to entertain such suits in the absence of the State's consent. (Citations omitted).
>
> "Protected by the same fundamental principle, the States, in the absence of consent, are immune from suits brought against them by their own citizens or by federal corporations, although such suits are not within the explicit prohibitions of the Eleventh Amendment." 292 U.S. at 329-30, 78 L.Ed. at 1289.

In Board of Supervisors of Lee County v. Payne, 175 Miss. 12, 166 So.332 (1936), this Court pointed out that counties and municipalities of the state are not on the same plane and that there are some fundamental differences between them. In Payne, we said:

"It is argued that counties and municipalities are upon the same plane, and should be held alike liable for a breach of a contract. The courts have universally made a distinction between counties and other municipal corporations, such as cities, towns, and villages. 'The principal ground upon which counties are not held liable for damages in actions for their neglect of public duty is that they are involuntary political divisions of the state, created for governmental purposes, and are organized without regard to the consent or dissent of the inhabitants. The theory upon which municipal corporations proper are held liable in such cases is that they are voluntary associations created and organized at the solicitation of, and with the free consent of, the inhabitants, under the laws of the state, and that the benefits accruing to the people by such incorporation compensate them for the liability. Another reason is that since the county is but a political subdivision of the state, a suit against the county is, in effect, a suit against the state, and that therefore an action will not lie without the consent of the legislature." 175 Miss. at 23, 166 So. at 335 (Emphasis added).

While it might be true that this doctrine was first enunciated by the English courts, still it came to this country as a part of the Common Law and early in the history of the United States was adopted as a sound and reasonable concept of the law.

The Legislature long ago began the process of chipping away at this doctrine of governmental immunity in appropriate areas. In 1914, the Legislature passed an act which provided:

> "The board of supervisors of any county shall have the power, in their discretion, to allow damages sustained to stock and other property injured or destroyed while traveling along the public highways maintained by the county where such loss is caused by defects in a bridge, causeway or culvert in such highway. No such payment shall be allowed unless such defects in such bridge, causeway or culvert was the proximate cause of the injury and not apparent or discoverable by the exercise of reasonable diligence, and no such payment shall be made unless such defect had existed for such a time that the failure to remedy or repair the same amounts to gross carelessness on the part of the county. Such payments shall be made from the county road and bridge funds, or from the road funds of the district where such accident occurred, as the circumstances render proper.
>
> "A claim under section 19-13-51 for accidents occurring shall be made in writing, itemized and sworn to, and shall be filed within three months after such accident occurs, and shall remain on file with the clerk of the board of supervisors for sixty days before the first day

of the term at which it comes up for hearing. Notice of its pendency shall be published in a newspapaer published in the county at least one time before such claim comes up for hearing, and if there be no paper in such county, by posting notices at the courthouse and other public places.

"No payment shall be made hereunder except by a four-fifths recorded vote of all the members of the board of supervisors. Where the property injured or destroyed is properly assessable, no evidence of the actual value of the property injured or destroyed shall be received or considered, but the assessed value thereof as shown by the assessment rolls of the county shall be the only evidence of value, and the damages allowed shall be fixed in proportion. Where the property injured or destroyed is not properly assessable and was not assessed, then the board of supervisors shall receive evidence of the actual value of the same, and shall allow damages in proportion. Sections 19-13-51 to 19-13-55 shall not be construed as creating any enforceable liability against any county."

Mississippi Code Annotated, §§ 19-13-51, 19-13-53, and 19-13-55 (1972).

It is apparent from even a cursory reading of these statutes that the legislature felt it necessary to carefully limit and circumscribe the approval of such claims. Even then in order for there to be no misunderstanding, the legislature said:

"Sections 19-13-51 to 19-13-55 shall not be construed as creating any enforceable liability against any county."

In 1972, the legislature provided for suits against counties or school districts operating school busses. Mississippi Code Annotated section 37-41-37 (Supp. 1976), provides in part:

"In the event of any accident resulting in the death of or injury to any person or in damage to property (a) arising out of the negligent operation of any school bus or other vehicle owned by any county or any municipal separate school district or public junior college district or consolidated school district, or operated by such county or municipal separate school district or public junior college district by private contract, for the transportation of pupils to and from the public schools of such county, or municipal separate school district or junior college, or (b) caused by a bus while being operated in pursuance of any activity of any of such schools, or (c) arising by reason of negligence in the maintenance, upkeep, repair or mechanical failure of such vehicle, any person receiving such injuries or sustaining such damages shall have a right of action against the county or municipal separate school district or junior college district or consolidated school district, which operates such vehicle. Such county or municipal separate school district or county or municipal separate school district or junior college district or consolidated

school district, may not plead the defense of governmental immunity in bar to any such action or recovery, and such suit may be tried as any other civil action." (Emphasis added).

Again the Legislature thought it necessary to limit and circumscribe recovery and to provide for funds out of which such claims could be paid. In Section 37-41-39 the Legislature provided for counties and school districts to pay into an "accident contingent fund" to be set up in the state treasury.

In Section 37-41-41 (Supp. 1976), the Legislature placed a limit of $10,000 on each such claim for one person, and $50,000 for any one accident. A limitation of $1,000 per claimant per accident was placed on a claim for property damage, and $550 on a claim for hospital, medical and doctor bills per person per accident.

In 1973, the Legislature provided for the purchase of liability insurance by counties:

> "The board of supervisors of any county in this state is authorized, in its discretion, to obtain and pay for liability insurance covering each, all or any of the motor vehicles of the county so as to cover the following damages for injury to persons or property, or both, caused by the negligence of any duly authorized officer, agent, servant or employee of such county while operating such motor vehicle in the performance of his official duties, said policy to be written by the agent or agents of a company or companies authorized to do and

doing business in the State of Mississippi. Provided, however, that on each vehicle the insurance policy shall be a minimum of ten thousand dollars ($10,000.00) for personal injury to any one (1) person in any one (1) accident, or a minimum of twenty thousand dollars ($20,000.00) for personal injury to two (2) or more persons in any one (1) accident, and a minimum of five thousand dollars ($5,000.00) property damage. All policies shall be subject to the approval of the board of supervisors and the premiums thereon shall be paid from the general fund of such county, road and bridge maintenance funds of such county or districts in such county. The board of supervisors of any county is authorized, in its discretion, to purchase general liability insurance coverage for its members and county employees in the official performance of their elective or appointive duties. Said general liability policy shall be written by the agent or agents of a company or companies authorized to do and doing business in the State of Mississippi. The monetary limits of any such policy shall be set by the board of supervisors in amounts they feel are adequate and reasonable in light of existing circumstances. The premiums on such policies shall be paid from the county general fund or from any other available county funds.

"If liability insurance is in effect in such county, such county may be sued by anyone affected to

the extent of such insurance carried; provided, however, that immunity from suit is only waived to the extent of such liability insurance carried and a judgment creditor shall have recourse only to the proceeds or right to proceeds of such liability insurance."
Miss. Code Ann.,§19-7-8 (Supp. 1976). (Emphasis added).

Our Federal courts have not seen fit to abolish the doctrine of governmental immunity by judicial fiat. They exercised the proper judicial self-restraint and waited for Congress to act. In 1946, Congress (representing all the people) enacted the Federal Tort Claims Act (28 U.S.C.A. §§2671-2680). This law has spawned prolific and, at times it seems, unlimited litigation.

Appellants contend that they were authorized to bring suit and did bring suit under the provisions of Mississippi Code Annoted §11-45-17 (1972), which provides:

"Any county may sue and be sued by its name, and suits against the county shall be instituted in any court having jurisdiction of the amount sitting at the county site; . . ."

Long ago, we held, in State Highway Commission v. Gully, 167 Miss. 631, 145 So.351 (1933):

"A general statutory grant of authority to sue a governmental subdivision or agency does not create any liability, and suit may

be maintained thereunder only for such liability as is authorized by statute, expressly or by necessary implication. City of Grenada v. Grenada County, 115 Miss. 831, 76 So.682; Brabham v. Board of Supervisors of Hinds County, 54 Miss. 363, 28 Am.Rep.352. At the time these cases were decided, the statute provided that any county might sue or be sued by its name, section 3484, Rev. Code 1871, section 309, Code 1906; and it was expressly held in each of these cases that there can be no liability against the state or its political subdivisions or agencies unless it is expressly or impliedly created by statute." 167 Miss. at 647, 145 So. at 354. (Emphasis added).

Of course, the courts, as well as the legislature, have the undoubted right to abrogate the doctrine of governmental immunity. We are of the opinion, however, that the legislature is in a better position to limit and restrict claims that can be asserted and to provide the ways and means for the paying of such claims (either by taxation or appropriation), if it should see fit to do so. Therefore, we decline to abolish the doctrine of governmental immunity at this time by judicial decision.

The trial court was correct in sustaining a general demurrer to the declaration. The judgment of the circuit court is, therefore, affirmed.

This case was considered by a conference of the Judges en banc.

AFFIRMED.

ALL JUSTICES CONCUR.

APPENDIX B

STATE OF MISSISSIPPI

To the Honorable the Circuit Court, of Hinds County--Greetings:

WHEREAS, on the 30th day of March, 1977 (the same being a day of the regular term of our SUPREME COURT, begun and held in the Court room, in the Capitol, in the City of Jackson, in said State, on the 1st Monday of March, in the year of our Lord, 1977, the following final Judgement was rendered by our SUPREME COURT, to-wit:

JUDY BERRY AND DONALD A. BERRY

NO. 49,135 vs.

HINDS COUNTY, MISSISSIPPI

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court, First Judicial District of Hinds County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 3rd day of July, 1975-be and the same is hereby affirmed. It is further ordered and adjudged that the appellant and Western Casualty & Surety Company, surety on the appeal bond herein, do pay all of the costs of this appeal to be taxed for which let proper process issue.

YOU ARE THEREFORE HEREBY COMMANDED, That such execution and further proceedings be had in said cause, as according to right and justice, and the judgment of our SUPREME COURT and the law of the land ought to be had.

WITNESS, the Hon. Robert G. Gillespie, Chief Justice of our Supreme Court; also the signature of the Clerk and the Seal of said Court hereunto affixed, at office, at Jackson, this the 26th day of April, A.D., 1977.

s/Julia H. Kendrick, Clerk

(Circuit Court #22,785)

APPENDIX C

IN THE CIRCUIT COURT OF THE FIRST

JUDICIAL DISTRICT OF HINDS COUNTY,

MISSISSIPPI

JUDY BERRRY and
DONALD A. BERRY — PLAINTIFFS

V. — NO. 22,785

HINDS COUNTY, MISSISSIPPI — DEFENDANT

J U D G M E N T

This cause came on for hearing by agreement of counsel for all of the parties hereto on the defendant's general demurrer to the Declaration exhibited against it herein and the Court having considered same on oral arguments of counsel finds:

1. That said general demurrer should be and the same is hereby sustained.

2. That the plaintiffs have declined to plead further herein.

IT IS THEREFORE ORDERED AND ADJUDGED that defendant's general demurrer to the Declaration filed herein be and the same is hereby sustained and that plaintiffs recover nothing of or from the defendant and that the Declaration filed herein be and the same is hereby dismissed with all Court costs incurred herein taxed against the plaintiffs, for which let execution issue.

ORDERED AND ADJUDGED this 3rd day of July, 1975.

s/Leon F. Hendrick
CIRCUIT JUDGE

APPROVED AS TO FORM ONLY:

s/Robert B. Sessums
Of Counsel for Plaintiffs

s/Thos. H. Watkins
Of Counsel for Defendant

APPENDIX D

THE UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CERTIFICATE OF SERVICE

I hereby certify that on this the 6th day of June, 1977, three copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, to Thomas H. Watkins, Fsq., and John N. Putnam, Esq., at their usual business addresses in Jackson, Mississippi, counsel for the respondent. I further certify that all the parties required to be served have been served.

Pat H. Scanlon

Pat H. Scanlon
1440 Deposit Guaranty Plaza
Jackson, Mississippi 39201

Counsel for Petitioners

In the Supreme Court of the United States

No. 76-1752

JUDY BERRY AND DONALD A. BERRY,
Petitioners,

vs.

HINDS COUNTY, MISSISSIPPI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS H. WATKINS
Post Office Box 650
Jackson, Mississippi 39205
Attorney of Record for Respondent

Of Counsel:
WATKINS & EAGER
Post Office Box 650
Jackson, Mississippi 39205

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

SUBJECT INDEX

Table of the Cases

TEXTBOOKS AND STATUTES CITED

In the Supreme Court of the United States

No. 76-1752

JUDY BERRY AND DONALD A. BERRY,
Petitioners,

vs.

HINDS COUNTY, MISSISSIPPI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of the State of Mississippi is officially reported in *Berry* v. *Hinds County*, 344 So.2d 146 (Miss. 1977).

OBJECTIONS TO JURISDICTION

This Court does not have jurisdiction of this cause because the petitioners' rights to equal protection and due process under the Constitution of the United States are not violated by the application of the doctrine of sovereign or governmental immunity.

STATUTORY PROVISIONS INVOLVED

The applicability of the Fifth Amendment of the United States Constitution is not in issue in this case because this provision of the Constitution was not cited to or urged by petitioners before either the Circuit Court of the First Judicial District of Hinds County, Mississippi, or the Supreme Court of the State of Mississippi.

STATEMENT OF THE CASE

The Statement of the Case of the petitioners is accepted by the respondent except that respondent would add the following:

The petitioners in the Declaration filed in Circuit Court urged that to deny relief against the County was to deprive the petitioners of rights insured by the Fourteenth Amendment to the United States Constitution. The Fifth Amendment to the United States Constitution is not mentioned in the Declaration. Likewise, in the brief filed by petitioners with the Mississippi Supreme Court the Fourteenth Amendment is mentioned, but no mention is ever made of the Fifth Amendment.

GROUNDS WHY THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

I.

The Doctrine of Sovereign or Governmental Immunity Is Not Violative of the Equal Protection Clause of the United States Constitution.

Contrary to what is urged by the petitioners, the courts of this country have many times been confronted with the argument that the doctrine of sovereign immunity violates the Equal Protection Clause of the Fourteenth Amendment, and each such time the court has rejected the argument. The cases rejecting precisely the argument espoused by the petitioners herein are numerous. The following cases are representative of such cases:

In *Swafford* v. *City of Garland*, 491 S.W.2d 175 (Tex. Civ.App. 1973) Swafford sued the City in tort founded on malicious prosecution. The trial court granted the City's motion for summary judgment based on the doctrine of sovereign immunity. The Texas Court of Civil Appeals affirmed stating:

> We find no merit in his [Swafford's] contention that the application of the doctrine of sovereign immunity in this case is offensive to the equal protection and due process clauses of the State and Federal Constitutions. . . . 491 S.W.2d at 176

In *Sousa* v. *State*, 341 A.2d 282 (N.H. 1975) Sousa and Evans sued for injuries they sustained when the State-owned-and-maintained bridge over which they were driving collapsed. The State filed motions to dismiss on the ground of sovereign immunity. The motions were granted.

On appeal the New Hampshire Supreme Court rejected the plaintiffs' constitutional arguments stating:

> . . . Nor does it constitute a violation of plaintiffs' rights to equal protection as all those who are similarly situated are similarly treated. . . . In short, we hold that there is no constitutional provision which confers on the plaintiffs a right to sue and hold the State liable for a tort. . . . 341 A.2d at 285

In *Hall* v. *Powers,* 6 Pa.Cmwlth. 544, 296 A.2d 535 (1972), aff'd 311 A.2d 612 (Pa. 1973), wherein a complaint in trespass had been filed against the Commonwealth and a Commonwealth employee, the Commonwealth Court of Pennsylvania stated:

> The plaintiff . . . has raised the issue here that Pennsylvania's doctrine of sovereign immunity constitutes a denial of equal protection and due process under the United States Constitution by creating two classes of litigants: those who have a cause of action because injured by a private tortfeasor, and those whose cause of action is barred by sovereign immunity. In Duquesne, supra [Duquesne Light Co. v. Dept. of Transportation, Pa. Cmwlth., 295 A.2d 351 (filed Oct. 2, 1972)], however, this Court specifically rejected that contention. 296 A.2d at 536

The Court sustained the Commonwealth's preliminary objections and dismissed plaintiff's complaint. The Supreme Court of Pennsylvania [311 A.2d 612] affirmed the order of the lower court.

In *Wood* v. *County of Jackson,* 463 S.W.2d 834 (Mo. 1971) the minor plaintiff, passenger in a car that went out of control and overturned on a bridge, sued the County of Jackson asserting that the County had failed to maintain the bridge in a safe condition. The County filed a motion to dismiss raising its sovereign immunity. The trial court sustained the motion. On appeal the plaintiffs asserted:

> ". . . The doctrine of immunity . . . violates Plaintiffs' constitutional rights under the Fourteenth Amendment to the Constitution of the United States . . . in that same discriminates against Plaintiffs by depriving them of their rights and property without due process of law and further denies them equal protection under the law. . . ." 463 S.W.2d at 835

The Missouri Supreme Court rejected the plaintiffs' contention and affirmed the dismissal of the petition stating: "Under the cases in this state all persons are barred from maintaining actions against the state and its political subdivisions by the doctrine of governmental immunity, and this includes counties." 463 S.W.2d at 835

Likewise, *O'Dell* v. *School District of Independence,* 521 S.W.2d 403 (Mo. 1975) was a suit by a student injured during wrestling practice against the School District of Independence, Missouri. Plaintiffs' petition was dismissed by the trial court because of the governmental immunity rule, and the plaintiffs appealed. The Missouri Supreme Court on appeal affirmed. The en banc Court in its majority opinion stated:

> Plaintiffs finally assert that the doctrine of sovereign immunity denies them equal protection of the law and due process . . .
>
> We are of the opinion that plaintiffs' assertion is without merit. Persons who seek recovery for negligence against a private tort-feasor and persons who seek recovery under the "Tort Defense Fund" are different classes of persons from those who seek recovery

> for negligence against the state or its political subdivisions. They are not similarly situated and they may be treated differently. Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971); Krause v. State of Ohio, 31 Ohio St.2d 132, 285 N.E.2d 736 (Ohio 1972). 521 S.W.2d at 409

In *Kriger* v. *South Oakland County Mutual Aid Pact,* 49 Mich.App. 7, 211 N.W.2d 228 (1973) the plaintiff sued the City and others in tort. The City moved for summary judgment contending that the Michigan statute providing that, except as otherwise provided, governmental agencies are immune from tort liability in all cases where the agency is engaged in the exercise of a governmental function shielded it from liability. The plaintiff appealed from the granting of the summary judgment motion asserting that the statute denied him equal protection of the law and that "the statute arbitrarily and unreasonably discriminates by denying relief to victims of public tortfeasors while according relief to victims of private tortfeasors for the same tort." 211 N.W.2d at 230. The Michigan Court rejected the plaintiff's argument stating:

> Courts in other jurisdictions have summarily dismissed similar equal protection claims. [Cases cited]
>
> * * *
>
> The "rational basis" test applies when the law allegedly infringing equal protection creates no fundamental rights. The right claimed by plaintiff clearly falls within that class. If a reasonable relation exists between the classification and some legitimate state interest, no denial of equal protection results. [Cases cited] Withholding legal remedy from persons injured by the state, while granting one to persons injured by nongovernmental tortfeasors does not offend the equal protection clause. 211 N.W.2d at 230-1

The plaintiff in *Kriger, supra,* had relied on the intermediate appellate court decision in *Krause* v. *State,* 28 Ohio App.2d 1, 274 N.E.2d 321 (1971). The Michigan court correctly held that the plaintiff's reliance thereon was misplaced stating that the case contained a questionable construction and application of the traditional equal protection tests and that the case had additionally been reversed by the Ohio Supreme Court in *Krause* v. *State,* 31 Ohio St.2d 132, 285 N.E.2d 736 (1972), appeal dismissed 409 U.S. 1052, 34 L.Ed.2d 506, 93 S.Ct. 557 (1972).

In *Knapp* v. *City of Dearborn,* 60 Mich.App. 18, 230 N.W.2d 293 (1975), a tort action against a city, the plaintiff contended among other things that the Michigan governmental immunity statute was unconstitutional because "its application unreasonably burdens free access to the courts" and "it creates an arbitrary distinction between tortfeasors and injured persons." 230 N.W.2d at 294. The Michigan court rejected the plaintiff's constitutional argument.

Crowder v. *Department of State Parks,* 228 Ga. 436, 185 S.E.2d 908 (1971), cert. denied *sub nom. Crowder* v. *Georgia,* 406 U.S. 914, 32 L.Ed.2d 113, 92 S.Ct. 1768 (1972) was an action on behalf of a minor injured by a fall in a state park. The defendants—the State of Georgia, the Department of State Parks of Georgia, its Director, and the Superintendent of Cloudland Canyon State Park—interposed the defense that the amended complaint failed to state a claim upon which relief could be granted and sovereign immunity. The trial court dismissed the action stating "there is no statute authorizing the suit against the State or its Department of State Parks and for this reason the case is dismissed. . . ." 185 S.E.2d at 910. The Court of Appeals affirmed the trial court. The Supreme Court of Georgia granted the plaintiff's application for certiorari

and in a decision affirming the judgment of the lower court held that the abrogation of the doctrine of sovereign immunity was a matter of public policy for action by the legislature, not the judiciary. As to the equal protection and due process arguments made by the plaintiff, the Georgia Supreme Court stated: "It [the doctrine of sovereign immunity] does not, we unhesitatingly hold, violate either the State or Federal Constitution." 185 S.E.2d at 911. See also *Azizi* v. *Bd. of Regents of the Uni. System of Ga.*, 132 Ga.App. 384, 208 S.E.2d 153 (1974), aff'd 233 Ga. 487, 212 S.E.2d 627 (1975).

Later in *Williams* v. *Georgia Power Company*, 233 Ga. 517, 212 S.E.2d 348 (1975), a death action based on negligence, wherein one of the defendants was Hancock County, the Georgia Supreme Court held that for the reasons given in *Crowder* v. *Department of State Parks, supra*, Code §23-1502 did not violate any provisions of the Federal Constitution. Section 23-1502 provides: "A county is not liable to suit for any cause of action unless made so by statute."

The United States Supreme Court has also held sovereign immunity constitutional. As early as 1858 in *Beers* v. *State of Arkansas*, 20 How. 527, 61 U.S. 527, 15 L.Ed. 991 (1858) the United States Supreme Court stated:

> It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission. . . . 15 L.Ed. at 992

In *Palmer* v. *Ohio*, 248 U.S. 32, 63 L.Ed. 108, 39 S.Ct. 16 (1918) the plaintiffs in error had sued Ohio for damages for flooding lands. The Ohio Supreme Court affirmed the action of the lower court dismissing the petition because the state had not consented to be sued. Section 16 of Article 1 of the Ohio Constitution read:

> Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

The Ohio Supreme Court held, as has the Mississippi Supreme Court, that such a section is not self-executing. The plaintiffs in error claimed that the decision deprived them of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. The United States Supreme Court rejected the contention finding that no Federal right was involved and that no Federal question was presented by the record in the case. The Court further stated:

> The rights of individuals to sue a state, in either a Federal or a state court, cannot be derived from the Constitution or laws of the United States. It can only come from the consent of the state. 248 U.S. at 34, 63 L.Ed. at 109

In *Seifert* v. *Standard Paving Company*, 64 Ill.2d 109, 355 N.E.2d 537 (1976) the Illinois Supreme Court, citing the earlier case of *Williams* v. *Medical Center Com.*, 60 Ill. 2d 389, 328 N.E.2d 1, stated:

> ". . . A constitutional grant of immunity to a sovereign government has never, so far as we are aware been held to be an arbitrary classification which violates equal protection." 60 Ill.2d 389, 394-95, 328 N.E.2d 1, 3. 355 N.E.2d at 539

The United States Supreme Court in *Reed* v. *Reed*, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251 (1971), wherein the Equal Protection Clause was under discussion, stated:

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. . . . 404 U.S. at 75, 30 L.Ed.2d at 229

In *Tigner* v. *Texas,* 310 U.S. 141, 84 L.Ed. 1124, 60 S.Ct. 879 (1940), the United States Supreme Court also stated:

> . . . The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. . . . 310 U.S. at 147, 84 L.Ed. at 1128

In 16 Am.Jur.2d *Constitutional Law* section 533 (1964) the authors state:

> It is a general rule that equal protection of the laws is not denied by a course of procedure which is applied to legal proceedings in which a particular person is affected, if such a course would also be applied to any other person in the state under similar circumstances and conditions.
>
> Equal protection of the laws of a state is extended to persons within its jurisdiction, within the meaning of the Fourteenth Amendment to the Federal Constitution, when its courts are open to them on the same condition as to others in like circumstances, with like rules of evidence and modes of procedure, for the security of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts.

With regard to the application of the doctrine of sovereign immunity in Mississippi, all persons similarly situated are treated similarly. All persons are barred from maintaining suits against the State and its political subdivisions including counties unless there is a specific statute authorizing suit. Furthermore, persons who seek recovery in negligence against private tort-feasors are a different class of persons from those who seek recovery for negligence against the State or its political subdivisions.

They are not similarly situated and may be treated differently. Moreover, a reasonable relationship exists between the classification that has been made and legitimate state interests.

The petitioner herein rely primarily on the decision of the Court of Appeals of Ohio in *Krause* v. *State,* 28 Ohio App.2d 1, 274 N.E.2d 321 (1971), which decision as admitted by petitioners was reversed by the Ohio Supreme Court. The Ohio Supreme Court in *Krause* v. *State,* 31 Ohio St.2d 132, 285 N.E.2d 736 (1972), appeal dismissed *sub nom. Krause* v. *Ohio,* 409 U.S. 1052, 34 L.Ed.2d 506, 93 S.Ct. 557 (1972), reh. denied 410 U.S. 918, 35 L.Ed.2d 280, 93 S.Ct. 959 (1973) held that the provision of the Ohio Constitution which established the doctrine of governmental immunity did not violate the Equal Protection Clause of the Fourteenth Amendment. The Court stated:

> The majority of the court below found the doctrine of governmental immunity violative of the Equal Protection Clause of the Fourteenth Amendment. It bottomed its decision upon a finding that the withholding of a remedy "from persons injured by state torts but not private ones or from some persons but not others injured by government in tortious, but different, phases of its activity" is capricious and represents no rational policy and thus "fatally offends the Constitution."

Section 16 of Article I is not, on its face, discriminatory, for it creates no classification. Without enabling legislation it is an absolute bar to suits against the state. Nor is the withholding of a legal remedy from persons injured by the state, while allowing a remedy for nongovernmental tortious activity, discriminatory governmental action. "The Constitution

does not require things which are different in fact or opinion to be treated in law as though they were the same." Tigner v. Texas (1940), 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124. "* * * the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways." Reed v. Reed (1971), 404 U.S. 71, 75, 92 S.Ct. 251, 253, 30 L.Ed.2d 225, 229. 285 N.E.2d at 744

In *Dairyland Insurance Company* v. *Board of County Commissioners of County of Bernalillo*, 88 N.M. 180, 538 P.2d 1202 (1975) the New Mexico court stated:

> . . . [T]he novel argument that the doctrine of sovereign immunity arbitrarily and unreasonably creates two classes of plaintiffs (one that can be made whole for negligently inflicted injuries and one that cannot) has never been presented to our Supreme Court. . . . They [the plaintiffs] cite only one case in support of their argument—Krause v. State, 28 Ohio App.2d 1, 274 N.E.2d 321 (1971), decided by the Ohio Court of Appeals. This case was later reversed by the Ohio Supreme Court, Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972), and appeal to the United States Supreme Court was dismissed for want of a substantial federal question. Krause v. Ohio, 409 U.S. 1052, 93 S.Ct. 557, 34 L.Ed.2d 506 (1972). Suffice it to say that we, as the Supreme Court of Ohio, feel that there are substantive differences justifying the special treatment of states and their political subdivisions when carrying on their governmental functions. Krause v. State, supra. 538 P.2d at 1203-4

In *Dairyland Insurance Company* v. *Board of County Commissioners of County of Bernalillo, supra*, motorists had brought suit against the board of county commissioners for personal injuries due to alleged negligence in the maintenance of a county road. The defendants' motion for summary judgment based on the defense of sovereign immunity was granted, and the plaintiffs appealed urging that the doctrine be declared unconstitutional as being in violation of the equal protection clause of the United States Constitution. The New Mexico court rejected the plaintiffs' contention and affirmed the judgment of the lower court.

The other case relied on by the petitioners is *Brown* v. *Wichita State University*, 217 Kan. 661, 538 P.2d 713 (1975), although the petitioners admit that the portion of the decision on which they rely was reversed by the en banc court on motion for rehearing in *Brown* v. *Wichita State University*, 219 Kan. 2, 547 P.2d 1015 (1976), appeal dismissed *sub nom. Bruce* v. *Wichita State University*, 50 L.Ed.2d 67, 97 S.Ct. 41 (1976). On rehearing the Court held that even where the court has abrogated judicially imposed governmental immunity, the legislature has constitutional authority to reimpose it and held K.S.A. 46-901, *et seq.*, did not offend any constitutional provision. In a thorough and well-reasoned decision, the Court specifically rejected the equal protection argument. The Court stated:

> The appellants contend K.S.A. 46-901, et seq., denies equal protection by discriminating between the various levels of governmental tort-feasors by imposing liability based on the unit of government involved. But withholding a legal remedy for persons injured by the state, while allowing a remedy for a non-governmental tortious activity, or a municipal government's tortious activity, is not discriminatory governmental action. (Krause v. State, 31 Ohio St.2d 132, 145, 285 N.E.2d 736 [1972], appeal dismissed for want

of a substantial federal question, 409 U.S. 1052, 93 S.Ct. 557, 34 L.Ed.2d 506, reh. denied, 410 U.S. 918, 93 S.Ct. 969, 35 L.Ed.2d 280; Hutchinson v. Board of Trustees of Univ. of Ala., 288 Ala. 20, 25, 256 So.2d 281 [1971]; and O'Dell v. School District of Independence, 521 So.2d 403, 409 [Mo. 1975].) The constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. (Tigner v. Texas, 310 U.S. 141, 147, 60 S.Ct. 879, 84 L.Ed. 1124, reh. denied, 310 U.S. 659, 60 S.Ct. 1092, 84 L.Ed. 1422.) The Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways. (Reed v. Reed, 404 U.S. 71, 75, 92 S.Ct. 251, 30 L.Ed.2d 225.)

Many states hold governmental immunity does not violate the equal protection clause of the Fourteenth Amendment. In states which have refused to judicially abrogate common law immunity, equal protection arguments have failed. [Cases cited.] States whose constitution requires legislative action to abrogate governmental immunity have held governmental immunity does not violate the equal protection clause of the Fourteenth Amendment. . . . 547 P.2d at 1025-6

The Kansas Supreme Court on rehearing in *Brown, supra,* further stated: "There are no cases which hold governmental immunity invalid based on the equal protection clause of the Fourteenth Amendment." 547 P.2d at 1029.

The decision of the Kansas Supreme Court on rehearing in the *Brown* case, *supra,* has been followed as controlling in subsequent cases such as *Malone* v. *University of Kansas Medical Center,* 220 Kan. 371, 552 P.2d 885 (1976).

Clearly, as shown above, the doctrine of sovereign or governmental immunity is not violative of the Equal Protection Clause of the United States Constitution.

II.

The Doctrine of Sovereign or Governmental Immunity Is Not Violative of the Due Process Provisions of the United States Constitution.

Many of the cases cited under Point I considered the question of whether or not the doctrine of sovereign immunity is offensive to the due process clauses of the United States Constitution. Each case held such immunity was not violative of due process. *Swafford* v. *City of Garland, supra; Hall* v. *Powers, supra; Wood* v. *County of Jackson, supra; O'Dell* v. *School District of Independence, supra;* and *Crowder* v. *Department of State Parks, supra.* See also *Snow* v. *Freeman,* 55 Mich.App. 84, 222 N.W.2d 43 (1974). The due process question was specifically raised before the United States Supreme Court in *Palmer* v. *Ohio, supra,* which involved sovereign immunity. The United States Supreme Court in *Palmer* v. *Ohio, supra,* specifically held that the case raised no federal question.

In its opinion on the motion for rehearing in *Brown* v. *Wichita State University, supra,* the Kansas Supreme Court addressed itself to the question of whether constitutional due process was violated by K.S.A. 46-901, *et seq.,* the Kansas statute that established governmental immunity. The Court held that K.S.A. 46-901, *et seq.,* violated no provisions of the United States Constitution. The Court stated:

> The court has been cited to no case where constitutional due process has been used as a basis for the abrogation of legislatively imposed governmental immunity. 547 P.2d at 1031

To support their argument on due process the petitioners cite *Boddie* v. *Connecticut*, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971). In opposition thereto respondent would cite *United States* v. *Kras*, 409 U.S. 434, 34 L.Ed.2d 626, 93 S.Ct. 631 (1973). In *Kras, supra*, the United States Supreme Court held that the provisions of the Bankruptcy Act and the complementary Order in Bankruptcy of the Supreme Court imposing fees and making the payment of those fees a condition precedent to a discharge in bankruptcy were not unconstitutional under the due process provisions of the Fifth Amendment as applied to the indigent Kras. Kras contended that his case fell squarely within *Boddie, supra*. The United States Supreme Court rejected this contention. The Court relied on the statement in *Boddie, supra*, "that the Court went 'no further than necessary to dispose of the case before us' and did 'not decide that access for all individuals to the courts is a right that is, in all circumstances guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual.' 401 U.S., at 382-383, 28 L.Ed.2d 113." 409 U.S. at 450, 34 L.Ed.2d at 638. The Court noted the fact that *Boddie, supra*, dealt with the marital relationship and the associational interests that surround that relationship and recognized the fundamental importance of those interests under the United States Constitution. The Court also noted the exclusive control of the state over the marriage relationship. The Court noted that Kras had other remedies to his situation even though the remedies might be unrealistic in a given situation. As in *Kras, supra*, persons injured by state action have other available remedies—i.e., getting a local and private law passed by the Legislature, uninsured motorist insurance, etc. Moreover, we do not in the present case have in issue something of fundamental importance like the marriage relationship.

Therefore, we submit that *Kras, supra*, not *Boddie, supra*, is the case that is properly applicable under the facts of the present case.

The authors in 16 Am.Jur.2d *Constitutional Law* section 544 (1964), in their discussion of due process, state: "The guaranty is inapplicable where there is no interference with life, liberty, or a vested property right." Clearly the sovereign immunity doctrine has not interfered with the life or liberty of the petitioners. Neither has it interfered with any *vested* property right. *Snow* v. *Freeman, supra*.

In addition, respondent questions the applicability of the Fifth Amendment to the United States Constitution to the case at bar since the Fifth Amendment is a limitation upon the power of Congress. Moreover, the Fifth Amendment was never urged before any of the lower courts. As stated by the authors in 5 Am.Jur.2d *Appeal and Error* section 546 (1962) citing numerous cases including a case from the United States Supreme Court:

> Corollary to the rule that errors not raised below will ordinarily not be considered on appeal is the rule that the reviewing court will consider the case only upon the theory upon which it was tried in the court below. . . .

The petitioners never presented any argument under the Fifth Amendment to any of the lower courts and, therefore, may not now assert that provision of the United States Constitution in this Court.

As shown by the foregoing discussion, the doctrine of sovereign or governmental immunity clearly is not violative of the due process provisions of the United States Constitution.

CONCLUSION

In conclusion, the respondent respectfully asks this Court to deny the petitioners' Petition for Writ of Certiorari because as set out above the sovereign immunity doctrine violates no federal constitutional right of the petitioners. The doctrine is not violative of the Equal Protection Clause or the Due Process Clause of the United States Constitution. No federal right or question is presented by the record in this case.

Respectfully submitted,

HINDS COUNTY, MISSISSIPPI
By: THOMAS H. WATKINS
Post Office Box 650
Jackson, Mississippi 39205
Attorney for Respondent

Of Counsel:
WATKINS & EAGER
Post Office Box 650
Jackson, Mississippi 39205

CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served with copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari have been served in that on this the 6th day of July, 1977, three copies of said Brief were mailed, air mail postage prepaid, to Pat H. Scanlon, Esquire, 1440 Deposit Guaranty Plaza, Jackson, Mississippi 39201, attorney of record for petitioners.

THOMAS H. WATKINS
Attorney for Respondent